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In The

Supreme Court of the United States

October Term, 1988

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY,

Petitioner,

v.

VERMONT DEPARTMENT OF PUBLIC SERVICE, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Vermont

SUPPLEMENTAL BRIEF OF THE VERMONT DEPARTMENT OF PUBLIC SERVICE

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Respondent Vermont Department of Public Service ("VDPS") submits this supplemental brief under Supreme Court Rule 22.6. This supplemental brief addresses points raised in the brief amicus curiae of Continental Bank N.A. filed July 10, 1989 in support of the petition ("Amicus Brief").[1] For the most part, VDPS joins in the arguments by Vermont Electric Cooperative, Inc. ("VEC") in its Brief in Response to the Amicus Brief dated July 20, 1989.[2] The Amicus Brief contains so many incorrect and misleading statements,

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[1]A supplemental brief is appropriate because the Amicus Brief is "intervening matter not available at the time of [VDPS'] last filing." Rule 22.6. Ordinarily, under Rule 36.1, an amicus brief in support of certiorari would be filed within the time allowed for the petition itself, so that respondents have an opportunity to address it. VDPS did not have an opportunity because the Amicus Brief was filed on the same day as VDPS' brief in opposition (July 10, 1989).

[2]VEC's Brief may also be considered a supplemental brief under Rule 22.6 for the reason given in note 1 above.

that it should not pass unchallenged.

ARGUMENT

1. The Amicus Brief Misrepresents The Proceedings Below.

Continental Bank's argument that MMWEC was denied due process rests on a false assumption. It is not true that MMWEC timely and properly "contended that the invalidation of the contracts would violate the federal constitution." Amicus Brief at 3. The Bank does not substantiate this assumption with citations to the record, but merely repeats MMWEC's unfounded assertions in the matter. In reality, MMWEC wholly failed to adequately present constitutional arguments below. MMWEC's failure belies any protest now that it was denied an opportunity to try its cause. Moreover, MMWEC's neglect to present its federal issues below, as reasonably required by Vermont procedure, disqualifies its petition for review under 28 U.S.C. § 1257(a). VDPS Brief In

Opposition at 9-14.

VDPS has carefully detailed the specifics of MMWEC's arguments at each stage of the proceedings below in VPDS Brief in Opposition at 4-14.

- In its answer, MMWEC simply did not plead any affirmative defense that invalidation of the PSAs would violate the Constitution. The Court will see, upon reading the eighth through fourteenth affirmative defenses, that MMWEC merely accused VDPS of unconstitutional action "by prosecution of the present litigation." Petitioner's App. 57a-58a; VDPS Brief In Opposition at 5-6, 10.

- In litigating the cross-motions for summary judgment, MMWEC made no mention, adduced no evidence, and cited no law, concerning constitutional defenses. Continental Bank's pat statement (Amicus Brief at 3) that the parties limited summary judgment to state law issues is cut from whole cloth. The Bank cites no substantiation whatsoever for this falsehood. That no such limitation existed is proved by the facts that the parties argued, and the trial court decided, issues raised by VDPS under the Vermont and federal constitutions. VDPS Brief In Opposition at 5, 6 n.3 & 11.

Similarly, Continental Bank cites nothing in the record for its remarkable assertion that "the trial court proceedings...deferred the affirmative defenses to a later stage." Amicus Brief at 5. This statement is a fiction. The Court will search in vain though the decision of the Superior Court (reprinted at Petitioner's App. 65a-85a) for anything even remotely suggestive of it.

On appeal, MMWEC was mum on constitutional issues. See VDPS Brief In Opposition at 6-7. Continental Bank asserts that MMWEC requested the Vermont Supreme Court to remand for determination of constitutional issues. Amicus Brief at 5, quoting MMWEC's Appellate Brief at 21. This argument rests on a snippet of MMWEC's appellate brief excised from context. The full text of the pertinent passage asked remand on other issues raised by other parties, and nowhere so much as mentioned any constitutional argument by MMWEC.[3]

[3]The full text is reproduced in the briefs of VDPS and VEC at 7 and 3a-4a, respectively. MMWEC, as petitioner, must "affirmatively show" that it presented a federal question not passed upon by the state court. Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550 (1987). MMWEC's petition, however, does not quote or cite this or any passage from its appellate brief below.

The full text of MMWEC's briefing on affirmative defenses is discussed in VDPS Brief In Opposition at 7, and 12-13.

- Continental Bank compounds this distortion by implying that MMWEC's motion for reargument alerted the Vermont court that failure to consider the new constitutional arguments was a due process "error." Amicus Brief at 5. In reality, neither MMWEC's appellate brief, nor its motion for reargument, nor its supporting memorandum, so much as hint that failure to address the constitutional arguments would violate due process. That argument first emerged in the petition here.

The motion for reargument, for the first time below, created arguments under the Commerce and Takings clauses. It mentioned the Due Process Clause only in respect to the doctrine of incorporation. As explained in VDPS Brief In Opposition at 13-14, this was neither proper nor timely.

2. The Vermont Court Properly Handled MMWEC's Appeal.

The Amicus Brief is devised to excite the misimpression of a due process outrage.[4] By repeated use of charged words such as "failure", "ignored", "refused", "pretermitted" and the like (Amicus Brief at 2-6 passim), Continental Bank implies that the Vermont court obstinately disregarded a constitutional argument presented to it for decision. One could just as well say that the Vermont courts "failed to consider" and "ignored" a host of other arguments that MMWEC did not make. In reality, the Vermont courts had no occasion to consider MMWEC's constitutional arguments because MMWEC presented none until seeking reargument after appeal. Even then, MMWEC did not

[4]There is high irony that Continental Bank, protesting that MMWEC was denied its day in court below, would have the Court summarily vacate the judgment without briefing or argument by respondents. Amicus Brief at 8-9.

urge that due process required consideration of its arguments. If that constitutes a denial of due process, then litigants could "sandbag" lower courts by omitting some issue, however farfetched, and later taking exception to the "failure" to consider it. It is basic that our courts do not allow such shenanigans; both Vermont and federal procedures reasonably require that a litigant timely present, pursue, and preserve its arguments for orderly consideration. See VDPS Brief In Opposition at 10-12. Litigants sacrifice arguments--sometimes by mistake and often by design--in almost every case, and there is no denial of due process in it.

Finally, Continental Bank turns in a false alarm by repeatedly charging that the Vermont court gave no reason for denying reargument. Amicus Brief at 4-6. This charge implies that the Vermont court acted in an unreasoned, even petulant, manner,

and it is flat out wrong. The Entry Order denies reargument squarely under V.R.A.P. 40, which is an adequate and independent state ground for the result. VDPS Brief In Opposition at 14-15. This Court has repeatedly denied review of almost identical state decisions which simply refused reargument to raise new constitutional issues. Prudential Fed. Sav. & Loan Ass'n. v. Flanigan, 478 U.S. 1711 (Rehnquist, Circuit Justice 1986)("court denied petition for rehearing without comment"); Estate of Wilson v. Aiken Indus., Inc., 439 U.S. 877, 879 (1978)(Blackmun, J., concurring in denial of certiorari)("Pennsylvania court denied reargument without explanatory comment"); McGarrity v. Delaware River Bridge Comm'n, 292 U.S. 19, 20 (1934)("No Federal question was raised prior to a petition for rehearing in the Supreme Court of the State, which was denied without more.")

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Vermont should be denied.

Respectfully submitted,

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August 25, 1989